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ARTICLE

Is Israel Still an Occupying Power in Gaza?

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Abstract The West Bank and the Gaza Strip came under Israeli occupation in 1967. Both territories had been under constant Israeli control since then, until Israel decided to withdraw its land forces and settlements from the Strip in 2005. Whereas the occupied status of the West Bank still remains uncontested, the status of Gaza after the disengagement is less clear. This article addresses the question whether the Gaza Strip can still be considered to be occupied after the 2005 disengagement. In order to formulate an answer to this question, the article will first outline the different elements needed to trigger occupation. It will then show that, even though the majority argues that the Gaza Strip is still occupied, the effective control test at the core of the law of occupation is no longer met and hence Gaza is no longer occupied. Given that Israel nevertheless continues to exercise some degree of control over Gaza and its population, the absence of occupation does not mean the absence of accountability. This responsibility is however not founded on the law of occupation but on general international humanitarian law, potentially complemented by international human rights law.

Keywords Occupation · Effective control · Gaza Strip · Israel-Palestine conflict · International humanitarian law · Post-occupation law · International human rights law

1 Introduction

Occupation is somewhat of a strange animal in the realm of armed conflicts. It is an atypical situation, positioned somewhere between peace and war, to which different specific obligations apply. The characteristic distortion between effective territorial

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control and sovereign title generated by such situations requires rules regulating the administration of the occupied territory. Furthermore, given that occupation generates a situation in which the population is in the hands of the enemy party, occupied populations also deserve specific protection.[1] Determining whether a situation is indeed one of occupation or not is thus decisive in assessing what obligations are applicable to the parties concerned. The obligations of an occupying power *vis-à-vis* the occupied territory and population are far more rigorous than those imposed upon a simple 'invader'. To give an example, whereas an enemy army merely has the obligation to allow the free passage of humanitarian relief for civilians in need (see customary international humanitarian rule 55), an occupying power would have the duty of ensuring food and medical supplies for the population to the fullest extent possible (see Article 55 of the Fourth Geneva Convention on the protection of civilians). Determining whether a situation is one of occupation or not is thus not without consequences on the level of protection offered to the civilians concerned. This is precisely why the debate on the occupation of Gaza is so heated.

The West Bank and Gaza came under Israeli occupation in 1967. Whereas it is clear that the West Bank continues to be occupied, the situation in the Gaza Strip is different. Indeed, in 2004, Israel decided to disengage its forces and remove the settlements from the Strip. It claimed that upon completion of this disengagement process, there would no longer be any grounds for claiming that the Gaza Strip continues to be occupied territory. The majority however disagree with the position adopted by Israel. Ultimately, the question of the status of Gaza revolves around the question whether Israel still exercises the effective control needed to trigger the law of occupation or not.

The ambit of this paper is to demonstrate that contrary to what most have argued, this is no longer the case. In order to substantiate this argument, I will first of all outline the definition of occupation and the different elements necessary for effective control to be asserted. I will then apply these criteria to the situation in Gaza and demonstrate that even though Israel continues to exercise an important level of control over the Strip, this control falls short of effective control as required under the law of occupation. Finally, I will assert that Israel however continues to have important responsibilities *vis-à-vis* Gaza and its population on the basis of general obligations under international humanitarian law potentially complemented by its obligations under international human rights law.

2 The Definition of Occupation

According to their common Article 2, the four Geneva Conventions of 1949, next to applying to international armed conflict in general, 'shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party'.[2] Being a

[1] See Art. 4 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereafter GCIV).

[2] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949; GCIV.

type of international armed conflict, occupation is regulated by the laws of war, and more specifically by the 1907 Hague Regulations,[3] the Fourth Geneva Convention of 1949 (GCIV) and some provisions of the 1977 Additional Protocol I.[4] On the basis of Article 42 of the Hague Regulations, 'territory is considered occupied when it is actually placed under the authority of the hostile army'. Given that no other definitions have been provided in subsequently adopted treaties on the subject, this definition remains the standard for determining the existence of a situation of occupation.[5] Importantly, Article 42 of the Hague Regulations further states that 'the occupation extends only to the territory where such authority has been established and can be exercised'. Consequently, occupation pertains only to those areas in which the needed control has been effectively established. The possibility of partial occupation has been further confirmed in Article 2 GCIV which established that the rules regulating occupation contained therein apply to 'all cases of partial *or* total occupation [emphasis added]'.

In order to determine in practice whether the definition of occupation is met, different elements need to be considered. First, it is important to highlight that the assessment is a factual one. Second, a further assessment of what is exactly required for the effective control test contained in Article 42 of the Hague Regulations to be met should be made. Third, the question whether boots on the ground are necessarily required to trigger occupation should also be discussed. Finally, it is not only important to look at when the law of occupation is triggered but also at what is exactly required for a situation of occupation to come to an end.

2.1 Occupation is a Question of Fact

The first important point to be noted in relation to the above-stated definition is that it clearly established that the assessment of a situation qualifying as occupation is a question of fact. This is even more apparent in the French and authentic version of Article 42 of the Hague Regulations: 'Un territoire est considéré comme occupé lorsqu'il se trouve placé *de fait* sous l'autorité de l'armée ennemie [emphasis added]'. This has important consequences in practice. First, the qualification of the situation by the parties concerned is of no relevance and hence does not have any

[3] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereafter Hague Regulations).

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[5] This has been confirmed by case law, see International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 126, para. 78; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, p. 168, para. 172 (hereafter *Armed Activities* case) and International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, 31 March 2003, paras. 215–216 (hereafter *Naletilić* case); as well as by state practice, see UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press 2004), para. 11.2 (hereafter UK Military Manual); US Land Warfare Field Manual (July 1956), Washington DC, 15 July 1976, para. 351 (hereafter US Military Manual). For a more complete list of manuals confirming the importance of Art. 42 HR for the assessment of occupation see Ferraro (2012), p. 138.

consequences for the legal determination of the situation.[6] Second, since it is purely a factual matter; no formal declaration is needed for a situation of occupation to come into existence. Consequently, even if the power concerned would deny the existence of such a situation, if the facts say otherwise, the situation will be qualified as occupation. This is far from being a hypothetical situation given the fact that being an occupier is considered to be highly ostracized and most occupying powers have tried to negate an occupation status in order to avoid the negative connotation it seems to imply.[7] Similarly, a mere proclamation of the existence of a situation of occupation is also insufficient to trigger the law of occupation given that there also needs to be occupation in fact.[8]

2.2 The Effective Control Test Contained in Article 42 of the Hague Regulations

For occupation to be factually established, the effective control test contained in Article 42 of the Hague Regulations needs to be met. Occupation creates a special situation in which effective territorial control is in the hands of the occupying power, while the sovereign title remains in the hands of the legitimate power, whereas these two elements are normally both in the hands of the latter.[9] The effective control test helps to determine whether this passage of (temporary) authority has in fact occurred. This is crucial given that the occupant needs to be able to exercise the rights and duties normally incumbent upon the legitimate power but momentarily suspended by the fact of occupation.[10] Keeping this in mind, two main conditions need to be fulfilled for the effective control test to be met: first, the occupying power needs to have rendered the incumbent government incapable of publicly exercising its authority in the area; and, second, the occupying power needs to be in a position to substitute its own authority for that of the legitimate power in

[6] Lavoyer (2004), p. 121.

[7] This was again confirmed during the 31st International Conference of the Red Cross and Red Crescent in 2011 dealing with the current challenges of contemporary armed conflict: 'practice has demonstrated that many States put forward claims of inapplicability of occupation law even as they maintain effective control over foreign territory or a part thereof, due to the reluctance to be perceived as an occupying power', 31st International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the challenges of contemporary armed conflicts', Report prepared by the International Committee of the Red Cross, Geneva, October 2011, pp. 26–27 (hereafter 2011 Challenges report). See also Benvenisti (2003), p. 860: 'Using sophisticated claims, all occupants in the past three decades avoided acknowledging that their presence on foreign soil was in fact an occupation subject to the Hague Regulations or Fourth Geneva Convention […]'. Consequently, as rightly remarked by Greenwood (2000), p. 218: 'the law of belligerent occupation has a poor record of compliance for most of the 20th century'.

[8] See UK Military Manual, above n. 5, para. 11.4.

[9] Cuyckens (2016), p. 417.

[10] Debbasch (1962), p. 324. See also the Report 'International humanitarian law and the challenges of contemporary armed conflicts', document prepared by the International Committee of the Red Cross, Geneva, October 2015, 32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8–10 December 2015, p. 11 (hereafter 2015 Challenges report).

the occupied territory.[11] These two conditions furthermore imply another important third condition, namely that the exercise of authority by the occupying power in place of the legitimate government is done without the consent of the latter.[12] If the legitimate power effectively and validly consents to the presence of the foreign power this would not trigger the law of occupation.

Occupation thus distinguishes itself from a mere invasion by the fact that there is some exercise of authority over the territory concerned. As Lassa Oppenheim so correctly stated, 'occupation is invasion *plus* taking possession of enemy country for the purpose of holding it'.[13] The exact moment in which an invasion becomes an occupation is however particularly difficult to determine. This has led some, and admittedly this is the majority opinion, to argue that in order to guarantee the best protection possible for the occupied population, some of the obligations of the law of occupation should already apply during the invasion phase.[14] Consequently, a distinction is created on the basis of the nature of the right concerned given that the rights guaranteed to individuals under the law of occupation would already apply during the invasion phase, whereas for the other rights, such as the rules concerning property for example, the effective territorial control test would still be required.[15] I would however like to adopt a stricter stance on this issue and clearly differentiate between the obligations resting upon an invading party and an occupying power. A conflation between the invasion and occupation phase is in my opinion problematic given that it creates a distortion between fact and law. This is even more problematic given the factual nature of the determination of occupation and the importance of the effective control test. In addition, applying different tests to different situations on the basis of the concerned right leads to a selective approach, and hence decreases legal certainty and confuses the troops on the ground. Furthermore, the Fourth Geneva Convention already foresees a general protection for both those falling in the hands of the enemy during the invasion phase *and* those under occupation.[16] Admittedly, this concerns a more basic protection and one that is less developed than the protection

[11] These two criteria were already clearly established in 1949: 'Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation *indicates the exercise of governmental authority to the exclusion of the established government* [emphasis added]'; United States Military Tribunal, Nuremberg, Case No. 47, *Trial of Wilhelm List and others*, United Nations War Crimes Commission. Law Reports of Trials of War Criminals, Vol. VIII, 1949, pp. 55–56 (hereafter *List* case). See also UK Military Manual, above n. 5, para. 355; Von Glahn (1957), p. 28; Zwanenburg (2007), pp. 109–110; Kolb and Vité (2013), p. 97.

[12] The importance of the absence of consent is for example confirmed by the definition of occupation provided by Benvenisti (2012), p. 3: 'the effective control of a power (be it one or more stated or an international organisation such as the United Nations) over a territory to which that power has no sovereign title, *without the volition of the sovereign of that territory* [emphasis added]'. See also Expert Meeting, 'Occupation and Other Forms of Administration of Foreign Territory', Report prepared and edited by T. Ferraro, Legal Advisor, International Committee of the Red Cross (ICRC), March 2012, p. 20 (hereafter Expert Meeting).

[13] Oppenheim (1905), para. 167.

[14] This position has been more commonly referred to as the Pictet Theory given that it has been developed by Jean Pictet in the commentaries to the Fourth Geneva Convention; Pictet (1958), p. 60.

[15] For an illustration of this position see for example *Naletilić* case, above n. 5, paras. 221–222.

[16] See the provisions of Part III, Section 1 of the Fourth Geneva Conventions common to the territories of the parties to the conflict and occupied territories.

offered to civilians under occupation but the needs of these two categories are also different. In addition, it is also not exceptional for international humanitarian law to offer different levels of protection to different categories of protected persons.[17] Finally, it also seems dangerous to impose obligations on the invader which it will ultimately not be able to fulfil given that at least some of the obligations require the enforcing power to have effective territorial control. Those believing that certain obligations of the law of occupation should already apply during the invasion phase also recognize this important limitation. They however state that the provisions are 'flexible enough not to require what is impossible in the invasion phase'.[18] In my opinion this only further complicates the matter and makes it even more difficult to assess which obligations of the law of occupation would exactly be applicable during the invasion phase. I thus believe that there are specific rules applicable during the invasion phase and that the obligations of the law of occupation only become applicable when the effective control test has in fact been met. In my opinion there should be no distinction based on the applicable right and hence no levelling in the obligations during the different phases.

The effective control test has also raised the question whether the required control needs to be actual or whether the mere potential exercise of control is sufficient. If potential control would be deemed to be sufficient, the test would be based on the capability of the enemy forces to exercise authority over the occupied territory rather than on their actual exercise of such control. It would thus be sufficient for the occupying power to have the capacity to substitute its authority for that of the legitimate sovereign. The capacity to establish such control should, however, not remain purely hypothetical and unfettered and it has been generally admitted that the occupying power needs to be able to establish actual control 'within a reasonable time' when needed.[19] There is a fundamental reason why the potential control test should, in my opinion, be favoured. Indeed, requiring actual rather than potential control would allow the occupying power 'to circumvent its obligations by simply refusing to establish the control it is in a position to establish'.[20] This would in turn generate two important gaps. First, it would create a gap in protection.[21] Putting the occupying power in a position to decide whether it wants to activate the law of occupation or not fails to protect the civilian population from the power it actually needs to be protected from. If the occupying power would be considered a neutral caretaker this would not be necessary, but occupation is rarely neutral and history has shown that the occupied population has been the subject of major abuses.[22] Second, it would also create a gap in governance.[23]

[17] Zwanenburg (2012), p. 33.

[18] Sassòli (2012), p. 43.

[19] See for example US Military Manual, above n. 5, para. 356: 'it is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district'.

[20] Zwanenburg (2007), p. 110.

[21] Expert Meeting, above n. 12, p. 19. See also Ferraro (2012), p. 151.

[22] Benvenisti (2012), p. 121.

[23] Ben-Naftali (2012), p. 542.

Occupation creates the exceptional situation in which there is a distortion between title and control. Given that the legitimate power has been temporarily incapacitated from exercising authority over the given territory, if the occupying power would refuse to establish such authority in order to avoid being subjected to the obligations incumbent upon it under the law of occupation, no authority will be exercised over the concerned territory. It is thus also crucial for the law of occupation to be correctly triggered in order to avoid a gap in the exercise of governmental functions such as ensuring public order and civil life in accordance with Article 43 of the Hague Regulations and Article 64 GCIV.

2.3 Are Boots on the Ground Necessarily Required?

Another important point to be raised in relation to the effective control test is the question of boots on the ground. Most authors have argued that the physical presence of hostile troops in the foreign territory is an integral part of the effective control test.[24] The prevalence of this position has been recently reconfirmed in two decisions by the European Court of Human Rights (ECtHR) concerning the Nagorno-Karabach region.[25] Nuance should however be brought to this position. Most importantly a distinction should be made between what is exactly required at the moment of the establishment of the occupation and what is required during the maintenance of the occupation. Indeed, if the requirement of physical presence is an absolute necessity for the establishment of the occupation, it might, in light of the potential control test, be less stringently needed for its maintenance.[26] In my opinion, the effective control needed to trigger occupation can indeed, in some specific circumstances and in light of modern technological developments, be maintained remotely, so without the (permanent) physical presence of troops.[27] The fact that there should be some leeway in interpreting the boots on the ground requirement during the maintenance of the occupation also seems to have been recognized by Yoram Dinstein, when he argues that 'the Occupying Power must deploy "boots" on the ground in *or near the territory* [emphasis added]'.[28] Similar

[24] Shany (2005), p. 370; Ben-Naftali (2012), p. 541; Ferraro (2012), p. 143. See also Expert Meeting, above n. 12, p. 17 and 2015 Challenges report, above n. 10, p. 20.

[25] ECtHR, *Sargsyan v. Azerbaijan*, Application no. 40167/06, 16 June 2015, para. 94 and ECtHR, *Chiragov and Others v. Armenia*, Application no. 13216/06, 16 June 2015, para. 96: 'according to widespread expert opinion physical presence of foreign troops is a sine qua non requirement of occupation, i.e. occupation is not conceivable without "boots on the ground"'. I would however rejoin the criticism expressed with regard to these two judgments by M. Milanovic, 'European Court decides that Israel is not an occupying power in Gaza', *EJIL Talk*, 17 June 2015, stating that, due to a lack of specific international humanitarian law expertise, they might have been overstating the degree of consensus on this point.

[26] Expert Meeting, above n. 12, p. 17.

[27] See also 2015 Challenges report, above n. 10, p. 12: 'it may be argued that technological and military developments have made it possible to assert effective control over a foreign territory (or part thereof) without a continuous foreign military presence in the concerned area'.

[28] Dinstein (2009), para. 100. Interestingly, he also argues that belligerent occupation cannot rest solely on either naval power or air power, but he argues that Gaza is still occupied, amongst other things because of the fact that they still control the maritime and air space.

to the problems demonstrated in relation to the actual control test, strictly requiring the occupying power to be physically present in the occupied territory would allow it to easily escape the obligations otherwise imposed upon it under the law of occupation by avoiding placing troops on the ground while nevertheless controlling the territory concerned from the outside, amounting in fact to a situation of effective control similar to a situation that would be sustained through troops on the ground. Leniency in the application of the physical presence requirement seems to furthermore correspond most with reality given that it allows two majority opinions to be reconciled, namely (1) that physical presence is an integral part of the effective control test, and (2) that despite the disengagement, the majority argues that Gaza is still occupied.

2.4 End of Occupation

The theoretical answer to the question of when an occupation comes to an end is an easy one and mirrors the conditions for triggering occupation: once the occupying power loses effective control over the concerned territory, the occupation ends.[29] The end of occupation is thus also a factual assessment. However, as is the case with most factual assessments, this assessment is far from easy to apply in practice and the question of the end of occupation is actually one of the most complex in practice.

Ordinarily the occupation ends 'when an occupant withdraws from the territory or is driven out of it'.[30] However, the occupying power rarely withdraws at once at an exact moment in time. A withdrawal rather occurs progressively, through a gradual thinning out of the forces concerned. Similarly, the exact moment of the loss of effective control when hostilities are resurging is also difficult to pinpoint, especially given that not all resurgences of hostilities will put an end to such control.[31] It is therefore difficult to assess if and when exactly the effective control has been lost. In addition, whereas effective withdrawal indeed ends occupation, the fact that foreign troops continue to be present on the territory concerned does not necessarily mean that the occupation continues. This is mainly the case when the legitimate power ends up consenting to the presence of the foreign troops. In practice this would for example be the case when a treaty ending an occupation is

[29] Benvenisti (2012), p. 56; Ferraro (2012), p. 156.

[30] Oppenheim (1905), para. 168. See also UK Military Manual, above n. 5, para. 11.7.

[31] In this regard the UK Military Manual informs us that: 'the fact that some of the inhabitants are in a state of rebellion, or that guerrillas or resistance fighters have occasional successes, does not render the occupation at an end. Even a temporarily successful rebellion in part of the area under occupation does not necessarily terminate the occupation so long as the occupying power takes steps to deal with the rebellion and re-establish its authority or the area is surrounding and cut off. Whether or not a rebel movement has successfully terminated an occupation is a question of fact and degree depending on, for example, the extent of the area controlled by the movement and the length of time involved, the intensity of operations, and the extent to which the movement is internationally recognized'; UK Military Manual, above n. 5, para. 11.7.1. A similar argument is made in the US Military Manual, above n. 5, para. 360: 'the existence of a rebellion or the activity of guerrilla or para-military units [will not] of itself cause the occupation to cease, provided the occupant could at any time it desired assume physical control of any part of the territory'.

accompanied by another one allowing the foreign forces to remain.[32] For consent to effectively terminate occupation, it however needs to be genuine, valid and explicit.[33] Finally, the fact that the end of occupation is a factual assessment also entails that merely declaring that the occupation has come to an end, while the facts on the ground still seem to show otherwise, is not sufficient. This was one of the main issues concerning the end of the occupation in Iraq. Indeed, whilst resolution 1546 (2004) proclaimed that by the 30th of June 2004, the Coalition Provisional Authority (CPA) administrating the territory on behalf of the occupying powers would cease to exist and that consequently Iraq would reassert its full sovereignty and thus reassert authority over the previously occupied territory,[34] the CPA in fact continued to exercise effective control over the concerned territory. If the transfer of authority would have been effective at the time stated in the resolution, then the occupation would have ended. However, given that effective control had not in fact been returned to the Iraqi government at that time, the mere declaration of the end of the occupation in United Nations Security Council resolution 1546 (2004) did not in fact end the occupation. For a transfer of authority to successfully end the occupation, it must thus be effective.[35] The idea is, of course, to avoid the occupying forces installing puppet governments and occupations by proxy in order to escape the occupying power's obligations, while *de facto* maintaining effective control over the territory.[36]

3 The Status of Gaza Post-Disengagement

Whereas until December 2006, the Gaza Strip as well as the West Bank were generally considered to be occupied in the sense of Article 42 of the Hague Regulations, the status of Gaza after the 'disengagement is less straightforward'.[37] It is from the outset important to recall that the debate concerns solely the Gaza Strip; the occupied status of the West Bank has not been questioned. The specific difference between both territories will be further outlined below.

In this part of the paper, we will apply the above-mentioned criteria for triggering (or maintaining) occupation concerning the situation of Gaza since the disengagement. We will show that whilst there is no doubt that Gaza used to be occupied, the effective control needed for the occupation to endure is no longer present. We will then address the so-called 'functional approach' which is used to argue that despite the fact that there is no longer effective control in the strict sense, the occupation nevertheless continues at least to a certain extent and we will show the pitfalls of such an approach.

[32] For concrete examples see Roberts (2005), p. 29.

[33] Expert Meeting, above n. 12, p. 21. See also Kolb and Vité (2013), p. 135.

[34] United Nations Security Council, Resolution 1546 (2004), S/RES/1546(2004), 8 June 2004, para. 2.

[35] Dörmann and Colassis (2004), p. 309. See also Scobbie (2006), p. 10.

[36] Dörmann and Colassis (2004), p. 309.

[37] Darcy and Reynolds (2010), p. 225.

3.1 The Effective Control Test and the Situation of Gaza Post-Disengagement

In accordance with its Revised Disengagement Plan of the 6th of June 2004, Israel withdrew its land forces and evacuated its settlements from Gaza.[38] The plan also specifically foresaw that once the process of disengagement would be completed, there would no longer be any basis for claiming that the Gaza Strip is still occupied territory.[39] We have seen, however, that a mere statement declaring occupation to be over is not sufficient to effectively terminate the occupation. Given the factual nature of the assessment, an objective assessment of the facts on the ground needs to be made. We thus have to assert whether the conditions required for the law of occupation to be triggered in fact continue to be met.

The debate surrounding the status of Gaza post-disengagement has been framed both in terms of the requirement for occupying troops to have boots on the ground, i.e. being physically located in the occupied area, as well as in terms of the continued existence or not of effective control. In my opinion, the question of boots on the ground is not the determinative one. Indeed, as was outlined above, the criteria of boots on the ground has to be nuanced in two ways: first, whereas it might be a stringent criterion for establishing occupation, it is not as strictly interpreted for the maintenance of the occupation; and second, the troops do not necessarily need to be positioned *in* the territory, but could also be posted in its *vicinity*. It is thus above all a question of the continued existence of effective control by the Israeli army over the Gaza Strip.

There is little doubt that Israel continues to exercise a considerable level of control over the Gaza Strip. Israel maintains complete control over Gaza's airspace[40] and territorial waters,[41] as well as over the crossings between it and the Gaza Strip.[42] It furthermore has a tremendous impact on the life of the Gaza Strip through its control over the passage of commercial goods into Gaza as well as its

[38] The Cabinet Resolution Regarding the Disengagement Plan, 6 June 2004 (as published by the Prime Minister's Office) Addendum A—Revised Disengagement Plan—Main Principles, http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx.

[39] The Disengagement Plan—General Outline, 18 April 2004 (Communicated by the Prime Minister's Office), http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Disengagement%20Plan%20-%20General%20Outline.aspx.

[40] Gisha (Legal Center for Freedom of Movement), 'Scale of Control: Israel's Continued Responsibility in the Gaza Strip', November 2011, p. 12 (hereafter Gisha Scale of Control report). See also United Nations General Assembly Human Rights Council, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict', A/HRC/12/48, 25 September 2009 (hereafter 'Goldstone report') stating in para. 383: '[s]ince July 2007 Hamas has been the de facto government authority in Gaza'. See also, more recently, Human Rights Council, 'Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1', A/HRC/29/52, 24 June 2015, para. 17 (hereafter Commission of Inquiry 2015 report), referring to the 'government-like functions' exercised by Hamas. These findings, however, do not seem to stand in the way of these bodies arguing that Gaza is nevertheless still under Israeli occupation.

[41] Gisha Scale of Control report, above n. 40, p. 13.

[42] Ibid., p. 14.

continued control of the Palestinian Population registry,[43] controlling whom and what goes into the Gaza Strip. The question, however, is whether the exercised control meets the threshold necessary for triggering occupation. The fact that Israel is not the sole authority exercising some form of authority over the Gaza Strip is, in my opinion, problematic in this regard. Indeed, since June 2007, Hamas carries out most of the governmental administration functions as well as being responsible for public services such as education, policing, sanitation and hospitals.[44] There is thus at the very least a form of concurrent control between Israel and Hamas, making it, in my opinion, very difficult to assert that Israel has the effective control required for occupation since effective control requires the occupying power to be in a position to substitute its own authority for that of the local authority. Even if some form of vertical power sharing between the occupying power and the local authorities is not necessarily an obstacle to effective control,[45] there however needs to be some hierarchical relationship between the occupying power and the said authority, the former retaining a form of control over the latter.[46] This does not seem to be the case in the relationship between the Israeli forces and Hamas. In addition, even if we adopt the more lenient potential control test instead of the actual control test (the latter would in any case not be met in the case at hand), the troops still have to be able to assert effective control over the presumably occupied territory 'within a reasonable time'.[47] Admittedly, the timeliness element was interpreted fairly leniently in the framework of, for example, the *List* case.[48] However, I would argue that in light of modern technological developments, what might have been considered reasonable back then, is not necessarily reasonable anymore. Consequently, if foreign armed forces need to engage in significant combat operations in order to recapture the area in question from local forces, then the territory can no longer be said to be occupied.[49] In this particular case, for Israel to reassert effective control over Gaza would require a major ground offensive and consequently it would not be possible 'within a reasonable time'. Relating to the fighting in

[43] Gisha Scale of Control report, above n. 40, pp. 17–19.

[44] Ibid., p. 23.

[45] Israeli High Court of Justice, 102/82, *Tsemel v. Minister of Defence*, as translated into English in the *Palestine Yearbook on International Law*, Vol. 1, 1984, p. 169, at p. 170: 'If we were in a situation where a regular military administration has been installed, the military force would be free to decide in what measure it exercises its powers within the sphere of civil administration through its direct delegates and what areas of civil administration should be left in the hands of the authorities of the previous regime, be these local authorities or officials of the previous regime. […] The fact that the authorities of the earlier regime are left to operate to some extent, does not detract from the reality of the existence of an effective military control over the territory nor detract from the incidental consequences under the laws of war'.

[46] In this regard see for example Ferraro (2012), p. 149.

[47] As was shown above, this 'reasonable' time requirement was already found in the *List* case, above n. 11, p. 56: 'While it is true that the partisans were able to control sections of these countries [i.e. Greece and Yugoslavia] at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country'; as well as being confirmed by military manuals such as the US Military Manual, above n. 5, para. 356 and learned authors such as for example Von Glahn (1957), p. 29.

[48] *List* case, above n. 11, p. 56.

[49] Gasser and Dörmann (2013), p. 273.

2008–2009, it was held that '[s]hould Israel wish to reintroduce its control over Gaza, it would face fierce military resistance and it would have to engage in very intensive and bloody military action'.[50] That intensive military action would be required to reassert effective control was again confirmed during the summer of 2014 by the magnitude of the Israeli operation 'Protective Edge'. Indeed, over the four weeks that the operation lasted, an estimated of 2251 Palestinians were killed and 11,231 were injured, 67 Israeli soldiers were killed and 1600 were injured, and the destruction of civilian infrastructure was tremendous.[51] Given that Israel is no longer in a position to assert effective control on the Gaza Strip 'within a reasonable time', the definition of occupation is no longer met and consequently the Gaza Strip is no longer occupied by Israel.[52]

This position was also confirmed by the Israeli Supreme Court in the *Al-Bassiouini* case concerning the reduction of the amount of fuel allowed into the Gaza Strip, when it held that:

> since September 2005 Israel no longer had effective control over what happens in the Gaza strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happen there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza strip or to maintain public order in the Gaza strip according to the laws of belligerent occupation in international law. Nor does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza strip.[53]

The difference between the situation of the Gaza Strip and the situation of the West Bank is specifically to be found in the two above-mentioned elements: (1) who has the ultimate authority over the area in question; and (2) can the authority be reasserted 'within a reasonable time'. First, whereas in the West Bank as well there has been some transfer of authority to the Palestinian Authority, the main difference is that the Palestinian Authority, contrary to Hamas, remains formally subjected to the Israeli Authority.[54] Indeed, as was established above, a vertical sharing of responsibilities does not necessarily affect the effective control of the occupying power as long as there remains a hierarchical relationship between the occupying power and the local authority, the former retaining a form of control over the latter. Second, contrary to the situation in Gaza, there is no doubt that the Israeli Defence forces (IDF) are at all times capable of reasserting control over the West Bank, even with regard to Area A, which is normally under exclusive Palestinian control.

[50] Bell and Shefi (2010), p. 274.

[51] Commission of Inquiry 2015 report, above n. 40, paras. 21–23.

[52] A similar position is adopted, amongst others, by Shany (2009), p. 105; Benvenisti (2012), p. 212; and Rostow (2007), p. 217.

[53] Israeli High Court of Justice, *Jaber Al-Bassiouni Ahmed and Others v. Prime Ministers and Minister of defence*, Case no. 9132/07, 27 January 2008, para. 12 (hereafter the *Al-Bassiouni* case).

[54] Bell and Shefi (2010), p. 274.

3.2 The Functional Approach to the Situation in Gaza

Opinions remain strongly divided, however, on the question of the exact status of Gaza and numerous authors,[55] non-governmental organizations (NGOs)[56] and international organizations[57] argue that the Gaza Strip is nevertheless still occupied. Different arguments are put forward in support of the position that Israel is still an occupying power in Gaza. First, there are those advocating that the Gaza Strip is still under Israeli occupation by arguing that the control exercised by Israel over the Strip does still meet the threshold for occupation.[58] This position will not be further analysed here because it quickly becomes a yes/no debate on whether the control still exercised over the Strip by Israel indeed fulfils the effective control threshold or not. Furthermore, my opinion on this point has already been clearly outlined above (see *supra* Sect. 3.1). Second, some use the what could be referred to as the indivisible argument, arguing that the West Bank and Gaza should be seen as a single territorial entity and hence the occupation should be assessed as a whole.[59] Given that the occupied status of the West Bank is not contested, the entire Palestinian Territories, including Gaza, would still be occupied. This argument will also not be further assessed given that such an argument contradicts the very text of the law itself. Indeed, both the clear reference to the possibility of a partial occupation of a territory in Article 2 common to the Geneva Conventions and the maxim that 'occupation extends only to the territory where such authority has been established and can be exercised' in Article 42 of the Hague Regulations make it clear that occupation can also be effected on only part of a territory.[60] Third, there is the so-called functional approach to occupation. Given that the ICRC recently seems to have voiced its support for this position,[61] the core of this section is going to be concerned with this approach.

[55] Mari (2005), pp. 356–368; Dinstein (2009), paras. 664–673; Scobbie (2006) pp. 3–31; Aronson (2005), pp. 49–63.

[56] This is the case, for example, for Amnesty International, Amnesty International Report 2014/15 to the State of Israel, available at https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/ (accessed 12 July 2016); See also Gisha Scale of Control report, above n. 40, p. 12.

[57] This is the leading position within the United Nations; see for example Goldstone report, above n. 40, para. 276; as well as of the European Union (EU); see EU Heads of Missions' Report on Gaza, 2013 available at http://www.eccpalestine.org/wp-content/uploads/2014/03/HoM-report-on-GAZA.pdf (accessed 12 July 2016). This is also the position of the ICRC, see Maurer (2012), p. 1506 and 2015 Challenges report, above n. 10, p. 12.

[58] See for example Human Rights Council, 'Report of the Special Rapporteur John Dugard on the situation of human rights in the Palestinian territories occupied since 1967', A/HRC/7/17, 21 January 2008, para. 11, and Goldstone report, above n. 40, para. 278. See also Dinstein (2009), para. 668; Mari (2005), p. 366; and Aronson (2005), p. 51.

[59] See for example Dinstein (2009), para. 666.

[60] Even if it is also clear that applying a different 'status' to Gaza and the West Bank further complicates the matter is practice, there is nothing in the law of occupation stating that the occupation of part of a territory means the occupation of the entirety of that territory.

[61] See 2015 Challenges report, above n. 10, p. 12.

The functional approach can be described as some kind of midway approach. In contrast to those merely arguing that in light of the scope and degree of control still being exercised by it, Israel continues to be an occupying power in Gaza, those advocating in favour of the functional approach recognize that Israel no longer has overall effective control over the Gaza Strip. They however also state that given that effective control has, in their opinion, been maintained over some areas, the law of occupation should continue to be applied to those areas that still remain under Israeli control.[62] The idea behind this theory is to allow the specific protection offered by the law of occupation to people under the control of a foreign power to endure in a complex situation such as the one of the Gaza Strip.[63] It recognizes that occupation does not always end at one point in time but that control can be relinquished in a gradual manner. Adopting a functional approach in such situations would then be necessary in order to avoid a legal vacuum.[64] In other words, as long as Israel continues to exercise some control over the Gaza Strip and Palestinian sovereignty has not yet been fully realized, it is in the opinion of those advocating this theory that it is not possible to argue that the occupation has ended.[65] There is thus some levelling in the obligations based on the exercised control: the obligations rooted in the law of occupation continue to apply to those areas still deemed to be under effective control whereas they no longer apply to those areas over which effective control has been relinquished.[66] Consequently, the nature and extent of the obligations will depend on the level of control exercised over the concerned area and whether it reaches the effective control threshold needed to trigger the law of occupation or not.

The functional approach seems to have been endorsed by the ICRC in its most recent report on the challenges of contemporary armed conflict to international humanitarian law:

> In principle, the effective control test is equally applicable when establishing the end of occupation, meaning that the criteria to be met should generally mirror those used to determining the beginning of occupation, only in reverse […]. The ICRC considers however, that in some specific and rather exceptional cases—in particular when foreign forces withdraw from occupied territory (or parts thereof) but retain key elements of authority or other important governmental functions usually performed by an occupying power—the law of occupation may continue to apply within the territorial and functional limits of such competences. Indeed, despite of the lack of physical presence of foreign forces in the territory concerned, the retained authority may amount to effective control for the purposes of the law of

[62] Gross (2012). This position has been largely taken in the Gisha Scale of Control report, above n. 40.

[63] Gisha Scale of Control report, above n. 40, p. 26.

[64] Ferraro (2012), p. 157.

[65] Gisha Scale of Control report, above n. 40, p. 40.

[66] Ibid., p. 26.

occupation and entail the continued application of the relevant provisions of this body of norms.[67]

The exceptional situation referred to in this paragraph is undoubtedly the situation in the Gaza Strip.

I fully agree with the fact that the law of occupation drafted at the beginning of the 20th century might not be completely adequate to deal with some contemporary features of occupation,[68] and that, furthermore, the situation of Gaza constitutes a complex case. This does not however mean that the concept should be overstretched in order to address these new and rather exceptional features. To this extent two main issues may be raised. Firstly, is it possible to apply the effective control test in Article 42 of the Hague Regulations in a way that it would be met for certain areas and not for others? Secondly, even if we were to accept such a possibility, how would that assessment be made and which obligations would apply to which areas of control?

One of the main issues in relation to the functional approach is the question of whether the determination of a situation of occupation is a binary question, meaning that either there is occupation or not, or whether there can indeed be some kind of *dédoublement fonctionnel*, implying a differentiated approach based on a differentiation depending on the level of control exercised over a particular area. When looking at Article 42 of the Hague Regulations containing the test used to trigger the application of the law of occupation, it seems clear that it is related to a test of effective *territorial* control. In other words, for the law of occupation to be triggered, a foreign force needs to be in effective control of a territory or parts thereof. Nowhere is it mentioned that exercising some control over certain areas in the non-territorial sense of the word would trigger occupation. Similarly, taking the full realization of Palestinian sovereignty into account in order to establish whether the obligations under the law of occupation have effectively ended is also not part of that test. To put it simply, either the effective territorial control test contained in Article 42 of the Hague Regulations is met and the law of occupation is activated or it is not. As was already demonstrated above, this is no longer the case with regard to the Gaza Strip, mainly because Israel is no longer in a position to effectively assert authority over the Gaza Strip within a reasonable time (see *supra* Sect. 3.1). Additionally, it has been argued, and to my opinion rightfully, that there is a close link between Articles 42 and 43 of the Hague Regulations establishing the obligation for the occupying power to restore and ensure public order and civil life.[69] If the foreign power would not be in a position to exercise this key obligation under the law of occupation it would make little sense to make some of the other obligations arising from the law of occupation applicable to it simply because they would be very difficult to fulfil.[70]

[67] 2015 Challenges report, above n. 10, p. 12.

[68] For an in-depth analysis of the question whether the law of occupation is still suitable for dealing with contemporary situations as well as a determination of ways in which to address the challenges raised by the potential gaps between the law and reality, see Cuyckens (2015).

[69] See, for example, Shany (2009), p. 106.

[70] Ibid., p. 106.

Concerning the second issue, even if we were to admit that a binary view of the law of occupation would be outdated, a certain number of practical issues would arise in relation to the functional approach. When would we consider the effective control test established under Article 42 to be met regarding an area that does not have a territorial component? And even if we would be able to make such an assessment, which specific rules of the law of occupation would be applicable to which areas and to what extent would these obligations apply? As Valentina Azarov so rightfully summarized:

> the fragmentation of the law of occupation, through the application of different sets of obligations at different points in time would turn the law from a 'set menu', intended to restrain and control the occupier, into dishes at a buffet from which the occupier can pick and choose as it likes.[71]

Such a pick and choose approach would entrust the occupying power itself with determining the extent of its own obligations and instead of enhancing protection even further, it would enhance the risk of abusive behaviour. There is thus a strong case to be made for the view that, in the end, a binary application of the law would foster more protection, since making all the obligations applicable would be more stringent for the occupation than a functional approach.[72]

In order to justify the legitimacy of the differentiating approach advocated by the functional approach, reference is made to the fact that such an approach also exists with regard to the transition from the invasion phase to the occupation phase (see *supra* Sect. 2.2).[73] I have already voiced my opinion against this theory earlier on in this paper and limitations similar to the ones I raised in this regard would also be applicable here.

To conclude, the functional approach should in my opinion not be withheld for two main reasons. Firstly, it overrules the effective territorial control test contained in Article 42 of the Hague Regulations and thereby overstretches the application of the law of occupation. Modifying the fundaments of an entire system in order to make it applicable to the *sui generis* exceptional situation of the Gaza Strip would create the risk of eroding the system altogether. Secondly, even if we were to accept such a deviating approach, establishing obligations commensurate with the level of control is also far from enhancing legal certainty and might even lead to more abuses in the end.

4 Alternative Grounds for Responsibility *vis-à-vis* Gaza and Its Inhabitants?

The complexity and the heated nature of the debate surrounding the status of Gaza is, in my opinion, mainly fuelled by the fact that Israel continues to exercise extensive control over the daily lives of the people residing in the Strip, whilst at the

[71] Azarov (2012).

[72] Azarov (2012).

[73] Gross (2012).

same time it is difficult to maintain that it is still an occupying power, at least in the strict sense. Concomitantly, there seems to be a need for this complex reality to be translated into obligations of some sort, be it under the law of occupation or otherwise.[74]

According to the Israeli Supreme Court in the *Al-Bassiouini* judgement, the residual obligations of Israel towards the Gaza Strip are based on the following three grounds: (1) the armed conflict that is still ongoing between Israel and Hamas[75]; (2) the control Israel still exercises over the border crossings; and (3) the importance of the relationship created between Israel and Hamas over the years. The first ground is relatively straightforward: due to the fact that there is still an armed conflict between Israel and Hamas, the relevant obligations under general international humanitarian law continue to apply. The two other grounds are more controversial, especially since there is no further detail provided by the Israeli Supreme Court in relation to these grounds. It is especially unclear what the legal obligations generated by these two others grounds would be, if any at all to start with.

The third option hinted at by the Israeli Supreme Court refers to what could be qualified as post-occupation obligations. These obligations mainly refer to the fact that given the length of the Israeli occupation a long-term relationship has been created between the occupier and the occupied territory and population. This ultimately resulted in a high level of dependency of the latter on the former in some areas, such as, for example, the provision of electricity as illustrated by the above-mentioned *Al-Bassiouini* case. Whereas the need for such a transitory regime seems quite forthright, especially in the case of long-term occupation, it is not very clear from which legal source such obligations would emanate. Even more so since long-term occupation is quite a recent phenomenon and is one that was not taken into account when the law of occupation was drafted. Different authors have explored this possibility of such post-occupation obligations. Importantly they all agree that these will not find their source in the law of occupation given that the precise ambit of these obligations would be to regulate the transition phase, once the occupation has come to an end and the law of occupation is thus no longer formally applicable.[76] Interestingly, the need for such obligations has been raised by both those arguing that there is no longer any occupation and those adopting the functional approach. In the framework of the latter view, the post-obligations will be applicable to those areas over which the effective control has been relinquished, whereas the law of occupation will continue to apply to those areas still under effective control.[77] Everyone also seems to agree, however, that there are not yet any clear post-occupation obligations founded in positive international law.[78]

[74] For a more detailed account of the reasons behind this debate see Shany (2008), pp. 68–86.

[75] In relation with the problem of electricity and fuel levels raised in *Al-Bassiouni*, above n. 53, the adequate obligation under international humanitarian law would be Art. 23 GCIV even though this might not be entirely satisfactory since this article, as we have seen above, only warrants the free passage of humanitarian goods and does not lead to an obligation to ensure a certain level of supply as Art. 55 GCIV would in situations of occupation.

[76] Ronen (2014), p. 431. See also Rubin (2010), p. 553.

[77] Gisha Scale of Control report, above n. 40, p. 48.

[78] Rubin (2010), p. 554.

Interestingly, the Court also makes no clear reference to potential human rights obligations. In my opinion, the extraterritorial application of human rights obligations would nevertheless provide the best option to characterize the level of control falling short of occupation exercised over Gaza. Indeed the degree of control required to fulfil the effective control test needed to trigger the extraterritorial application of international human rights obligations is lower than the one needed for occupation. It can thus be that the amount of control falls short of occupation but nevertheless triggers the extraterritorial application of international human rights law.[79] I tend to agree with Yuval Shany that 'international human rights law may serve as the "missing link" between Israel's *de facto* power over Gaza […] and the obligation to provide basic supplies to Gaza'.[80] The application of human rights obligations would actually fit the exercise quite well given that they constitute obligations levelled to the amount of control over people or territory.[81] The question is whether we could argue that the territory and/or the population of Gaza fall within the (extraterritorial) jurisdiction of Israel. Choosing the extraterritorial application of the human rights law path is indeed also not without difficulties. The difficulty lies more particularly in the fact that there is no clear-cut situation of extraterritoriality here, given that Israel operates from its own territory and hence not extraterritorially. The extraterritorial element is not founded on its presence on foreign ground but is based on the fact that conduct emanating from the territory of Israel has extraterritorial effects.[82] This does not correspond to the classical models of extraterritorial jurisdiction.[83] An attempt could however be made to argue that there is some personal jurisdiction over the people of Gaza due to the fact that the Israeli actions have great repercussions on important areas of daily life but this would most probably mean an extensive interpretation of the personal model of extraterritorial jurisdiction. It is interesting in this regard to look at the 'effects doctrine' developed by Yuval Shany: if action by the Israeli authorities has direct, substantial and foreseeable effects upon or in the territory of Gaza, the relevant human rights obligations would be applicable to those actions.[84] This could be argued to be the case regarding control over the borders, the population registry and the tax system.[85] Concretely this would for example entail that the Israeli authorities would have to respect the freedom of movement as enshrined in Article 12 of the ICCPR

[79] Ronen (2014), p. 429.

[80] Shany (2009), p. 110. See also, Lubell (2011), p. 250 in which he states that the fact that Gaza would no longer be occupied would not necessarily release Israel from its obligations towards the population, for example under certain theories of human rights obligations.

[81] Gisha Scale of Control report, above n. 40, p. 59.

[82] However, according to Kleffner (2010), p. 69 several human rights bodies do seem to have recognized that human rights obligations also extend to measures within a State's territory that have extraterritorial effect.

[83] For a further analysis of these two models see Milanovic (2011), pp. 118–228.

[84] Shany (2009), p. 113.

[85] Gisha Scale of Control report, above n. 40, p. 61. Shany (2009), p. 114 also refers to the area of border control for the potential successful application of this theory.

with regard to the control exercised over the passage of people and more generally the rules relating to economic rights when dealing with the passage of goods.[86] Similarly, they would, for example, also have to respect the right to family life (Article 17 ICCPR) when taking decisions relating to the administration of the population registry.[87] It is in any case important to mention that these human rights obligations would exist alongside the obligations under general international humanitarian law. Indeed, it has been generally admitted that 'both spheres of law are complementary, not mutually exclusive'.[88]

Imposing human rights obligations on Israel *vis-à-vis* the population of Gaza would however also be very difficult to realize in practice since Israel does not recognize even the 'regular' extraterritorial application of human rights obligation, nor even the continued application of human rights law during armed conflict.[89]

5 Conclusion

Given that there is no longer any effective control in the sense of Article 42 of the Hague Regulations, it is difficult to sustain that Gaza is still occupied. The difficulty surrounding the situation of Gaza is that Israel continues to exercise an important level of control over the Gaza Strip and its population, making it difficult to accept that it would no longer have any obligations with regard to the Strip. Whereas it is clear that some international humanitarian law obligations still exist based on the ongoing armed conflict between Israel and Hamas, the situation seems to require an additional form of obligations, even if it is not quite clear where these obligations would stem from.

In the absence of specific post-occupation obligations that might be needed in order to address the aftermath of long-term occupation, human rights law seems to be the best possible answer to some of the gaps needed to be filled in such cases. Or, alternatively, we might just have to accept that at the present stage of the development of international law, there are not yet any international obligations which are sufficiently capable of addressing a situation like the one raised by the situation of Gaza. In my view, it is in any case not a solution to bend the law in order to make obligations applicable when they are no longer to be formally applied.

[86] Gisha Scale of Control report, above n. 40, p. 61. Israel has ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural rights (ICESCR).

[87] Gisha Scale of Control report, above n. 40, p. 61.

[88] See for example International Covenant on Civil and Political Rights, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/REV.1/add.13, 26 May 2004, para. 11.

[89] Gill (2013), p. 255.

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